No. 2461

In the Supreme Court

OF THE UNITED STATES

October Term, 1942

RESEARCH LABORATORIES, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Second Circuit

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TO THE HONORABLE, THE SUPREME COURT
OF THE UNITED STATES:

STATEMENT OF THE MATTER INVOLVED

On December 7, 1940, there was filed in the District Court of the United States for the Western District of Washington, Southern Division, an Amended Libel of Information (R. 19-23) by which the United States of America by its above named attorneys of record informed the Court that there was in possession of the Crown Drug Company of

Kansas City, Jackson County, Missouri, 143 packages, more or less, of an article labeled in part "NUE-OVO", stating the showing of an analysis of the article, and alleging that the article is misbranded in violation of the Federal Food, Drug & Cosmetics Act (21 U.S. 352) (a) in that statements appearing in the labeling thereof, viz., in the circulars entitled "What is Arthritis?" accompanying the said articles were false and misleading in that all and singular of the statements therein and the whole thereof created the impression in the mind of the reader thereof that the said article is a competent treatment for arthritis, etc., whereas the said article is not a competent and beneficial treatment for arthritis. Subdivisions numbered IV and V of the said Amended Libel of Information disclosed that the respondent contended that the said circulars accompanied the said article while in interstate commerce, in that a shipment of said circulars from Nue-Ovo, Inc., Chicago, Illinois, were received in interstate commerce by the Crown Drug Company of Kansas City, Missouri, at its warehouse, located at 2110 Central Street in said City, simultaneously with the said article; and that said circulars ("What is Arthritis?") and the shipment of "NUE-OVO" were placed, then and there, in the same room of the said warehouse for distribution to retail stores of the said Crown Drug Company, Kansas City, Missouri,. That said circulars accompanied packages of "NUE-OVO" in the said retail Crown Drug Stores

and were prominently displayed in the said stores in the same rooms and in close proximity to the said packages of "NUE-OVO" and that said circulars were distributed to persons, that is, members of the public who appeared in said drug stores.

Said Amended Libel of Information prayed that process issue directing the U. S. Marshal for the Western District of Missouri to seize said shipment of Nue-Ovo for condemnation, etc.

On the 18th day of December, 1940, the petitioner, Research Laboratories, Inc., as intervenor, filed Exceptions to the said Amended Libel (R. 23-24). By these Exceptions it is contended that the Amended Libel failed to state in what particulars the labeling was claimed to be false and misleading, and what particular statements were claimed to be false and misleading. The intervenor asked that the libelant be required to amend the Libel to disclose the particular statements claimed to be false and misleading and the particulars in which it was claimed that the labeling was false and misleading. Said exceptions also set forth the contention that the Amended Libel failed to state how and in what manner the circular "What is Arthritis?" is claimed to have accompanied the said article. As a third exception the intervenor stated that the Amended Libel fails to state facts sufficeint to constitute a cause of action.

On the 2nd day of June, 1941, the said Court in which said proceeding was filed entered its "Order Sustaining Exceptions to Amended Libel and Order of Dismissal" (R. 25-26), by which it was held that the Third Exception of the intervenor to the Amended Libel, upon the ground that the Amended Libel fails to state facts sufficient to constitute a cause of action should be sustained and the said action dismissed, and allowing an exception.

Thereafter respondent, as appellant, appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the said judgment and decree in the said District Court, and such proceedngs were thereafter had that on the 24th day of February, 1942, there was filed in said Circuit Court of Appeals a decree (R. 66-67) by which the said Order of Dismissal of the said District Court was reversed upon the grounds stated in an opinion of Circuit Judge Matthews of said Circuit Court of Appeals (R. 60-66) in which opinion the contentions of the parties were stated and in which the Court held that in substance the Amended Libel stated that the 143 packages of Nue-Ovo and the printed circulars containing alleged false and misleading statements concerning Nue-Ovo were both shipped from Chicago, Illinois to Kansas City, Missouri, that all of the packages and all of the circulars were so shipped by a single shipper (Nue-Ovo, Inc.) to a single consignee (Crown Drug Co.) and were received by said consignee simultaneously in inter-

state commerce and that while the Libel did not state whether the packages and the circulars did or did not travel in the same crate, carton or other container or on the same train, truck or other vehicle during their interstate journey, such matter was immaterial. That in view of the fact that the packages and the circulars had a common origin and a common destination and arrived at their destination simultaneously it should be held that they accompanied each other regardless of whether, physically, they were together or apart during the journey. With reference to the contention of the petitioner that the circulars constituted advertising and, therefore, did not constitute labeling within the meaning of the Act the Circuit Court of Appeals held that the assumption that printed matter (such as circulars) cannot constitute both advertising and labeling is unwarranted. The Court also held that there was no merit in the appellee's contention that the Libel did not specifically charge that the circular entitled "What is Arthritis?" is false and misleading.

(For Copy of Contents of Pamphlet see R. 15-16)

Thereafter, and to-wit on April 2, 1942, an order was entered in the said Circuit Court of Appeals denying the Petitioner's Petition for Rehearing (R. 66-67).

Subsequently an Order was made by the Honorable Justice William O. Douglas granting the peti-

tioner to and including the 1st day of August, 1942, within which to file this PETITION FOR WRIT OF CERTIORARI.

There are two questions that the petitioner feels should be determined by this Court in this case and each involves the definition of a single word as the same is used in Sec. 201 (m) of the Federal Food, Drug & Cosmetic Act (21 U.S.C., Sec. 321 (m)). One is the correct definition to be given the word "labeling" as that word is defined in the Act and the other is the correct definition to be given the word "accompanying" as that word is employed therein. In other words, it is the contention of the petitioner that the term "labeling" as used and defined in the Act does not include an advertising circular, the mis-use of which comes directly within the purview of the authority and jurisdiction given the Federal Trade Commission; and that the history and reasonable construction of the Act upon which the Libel in this case is predicated discloses that the Congress of the United States specifically eliminated from the authority and jurisdiction of the Pure Food and Drug Division of the Department of Agriculture purely advertising matter.

The other contention to be disposed of is that inasmuch as the printed circulars were not in any way enclosed at any time in interstate commerce with the packages of Nue-Ovo, nor in any way attached thereto, during their progress in interstate commerce, there was no "accompanying" within the

meaning of that term as used in the said Federal Food, Drug and Cosmetic Act.

The decision which the petitioner desires reviewed is a decision and judgment of a Circuit Court of Appeals and is subject to review by the Supreme Court of the United States under Sec. 240, Judicial Code, 28 U.S.C.A., No. 347.

The questions presented by this petition have been necessarily included in the summary and short statement of the matter involved, above set forth.

The reasons relied on by the petitioner for the allowance of the Writ are as follows:

1. The Circuit Court of Appeals in this case has decided an important question of Federal Law which has not been, but should be, settled by the Supreme Court of the United States; and the said question has been decided in a way which the petitioner feels is probably in conflict with applicable decisions of the said Supreme Court.

2. That the said matter decided by the Circuit Court of Appeals has been otherwise decided by at least two Judges of District Courts of the United States, to-wit, the decision in this case by Honorable Lloyd L. Black, Judge of the District Court of the United States for the Western District of Washington and the decision of the Honorable F. Ryan Duffy, Judge of the District Court of Wisconsin, in the case of United States of America vs. Royal Lee, 40 Fed. Sup. 801.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and proceedings of said Circuit Court of Appeals in said case, entitled United States of America, Appellant, vs. Research Laboratories, Inc., Appellee, to the end that the said case may be reviewed and determined by this Court as provided by Sec. 240, Judicial Code, and that your petitioner may have such other and further relief or remedy as this Court may deem appropriate and in conformity with the said Judicial Code, and that the said judgment in the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

RESEARCH LABORATORIES, INC.,
Petitioner.
ALEXANDER G. BARRY,
Attorney for Petitioner.

HARRY G. HOY
Of Counsel for Petitioner.

CERTIFICATE

We hereby certify that the foregoing Petition is, in our opinion, well founded, and that it is not interposed for delay.

ALEXANDER G. BARRY,
Attorney for Petitioner.

HARRY G. HOY,
Of Counsel.

BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1942

RESEARCH LABORATORIES, INC.,
Petitioner,

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Respondent.

BRIEF IN SUPPORT OF PETITION

STATEMENT

The statute under which jurisdiction is invoked in this case is Section 240, Judicial Code, 28 U.S.C.A., No. 347.

On the second day of June, 1941, the District Court of the United States for the Western District of Washington, Southern Division, entered an Order

sustaining Exceptions to the Amended Libel and an Order of Dismissal (R. 25).

On the 24th day of February, 1942, The United States Circuit Court of Appeals for the 9th Circuit filed and entered its Opinion containing an order for a decree to the effect that the said Order of the said District Court dismissing said Amended Libel was reversed (59-60).

On the 24th day of February, 1942, said United States Circuit Court of Appeals filed and entered a Judgment and Decree, based upon said Opinion, reversing the said Judgment and Order of The United States District Court for the Western District of Washington, Southern Division (66).

A Petition for Rehearing having been filed the said United States Circuit Court of Appeals for the Ninth Circuit on the 2nd day of April, 1942, made an Order denying said Petition for Rehearing (R. 67).

Thereafter, by order of the Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States filed directly in said Court, the Petitioner was granted to and including the 1st day of August, 1942, within which to file a Petition for Writ of Certiorari to the said United States Circuit Court of Appeals.

STATEMENT OF FACTS

The case at bar is a proceeding in Admiralty brought by the United States of America against 143 Packages, More or Less, of a Product known as "Nue-Ovo", seeking the condemnation thereof as a drug within the meaning of Title 21, Sec. 321 (g) U.S.C. The Government alleged said drug to be misbranded in violation of the Federal Food, Drug & Cosmetic Act (21 U.S.C., Sec. 352 (a)). The case originated in the District Court of the United States for the Western District of Missouri, Western Division but such proceedings were had that it was afterward removed to the District Court of the United States for the Western District of Washington, Southern Division. The Petitioner, Research Laboratories, Inc., intervened and filed Exceptions to the Libel of Information, which Exceptions were upheld.

On December 7, 1940, the Government filed an Amended Libel of Information (R. 19) in which it was alleged that the goods seized and copies of the circulars which it was claimed constituted misbranding were shipped separately from Chicago, Illinois to Kansas City, Missouri, both consigned to the Crown Drug Company of the latter City. That the said circulars were received by said consignee simultaneously with the bottles of Nue-Ovo and that thereupon the Circulars and the said bottles were placed in the same room of the warehouse of

said Crown Drug Company in Kansas City and that thereafter in Kansas City the circulars and the packages of Nue-Ovo were sent together to certain retail drug stores of said company and that said circulars were prominently displayed in said retail stores in close proximity to the packages of Nue-Ovo and were distributed to members of the public who appeared in said drug stores. The Amended Libel alleged that the said circulars were false and misleading in that they create the impression in the mind of the reader that the article (Nue-Ovo) was a competent treatment for arthritis and that the use thereof would be beneficial in treating it, whereas in truth said article was not a competent and beneficial treatment for arthritis.

On the 18th day of December, 1940, the intervenor (the Petitioner here) filed its Exceptions to the Amended Libel of Information (R. 23). Exception No. III of these Exceptions to the Amended Libel charged that the same failed to state facts sufficient to constitute a cause of action.

In the said Amended Libel of Information a copy of the matter contained in each of the said circulars was set forth as an exhibit (R. 15-16). Throughout the proceedings there has been no contention by the Government that any of the said circulars was contained in the same package or packages of the said goods so seized, nor for that matter shipped together with the goods in the same

vehicle in interstate commerce. In other words, although the Government contends that the circulars "accompanied" said articles while in interstate commerce that claim is based upon the statement that the "circulars were received in interstate com-"merce by said Crown Drug Company at its ware-"house in Kansas City simultaneously with the bot-"tles of Nue-Ovo, the circulars and the bottles of "Nue-Ovo were placed in the same room of said ware-"house for distribution to three or more retail drug "stores of said drug company, the circulars and "packages of Nue-Ovo were sent together to the said "retail drug stores of said company and were promi-"nently displayed in said stores in the said rooms "and in close proximity to the packages of Nue-Ovo, "and were distributed to members of the public who "appeared in said drug stores."[1]

The Trial Court sustained the Exception that the Amended Libel fails to state facts sufficient to constitute a cause of action and dismissed the Government case, allowing the libelant an exception. Upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, the appellate Court rendered its opinion (R. 60) in which after stating the facts very much as stated above, it made, among others, the following observations pertinent to this case:

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[1] Quotation from page 3 of Government's Brief filed in United States Circuit Court of Appeals for the Ninth Circuit.

1. Thus, in substance, the libel states that 143 packages of Nue-Ovo and printed circulars containing false and misleading statements concerning Nue-Ovo were shipped in interstate commerce from Chicago, Illinois, to Kansas City, Missouri, and that all the packages and all the circulars were so shipped by a single shipper (Nue-Ovo, Inc.) to a single consignee (Crown Drug Company) and were by said consignee simultaneously received in interstate commerce.

2. These statements must, for present purposes, be taken as true. Taking them as true, we hold that the circulars accompanied the packages and constituted their labeling within the meaning of the Act; that, since the circulars were false and misleading, the packages were misbranded within the meaning of the Act; that, since the circulars accompanied the packages in interstate commerce, the packages were misbranded while in interstate commerce within the meaning of the Act; and that, therefore, the packages—and, of course, their contents—are subject to condemnation.

3. The libel does not state, nor is it material, whether the packages and the circulars did or did not travel in the same crate, carton or other container or on the same train, truck or other vehicle during their interstate journey. The packages and the circulars had a common origin and a common destination and arrived at their destination simul-

taneously. Clearly, therefore, they accompanied each other, regardless of whether, physically, they were together or apart during their journey.

4. Appellee contends that the circulars constituted advertising and, therefore, did not constitute labeling within the meaning of the Act. The contention assumes that printed matter (such as circular) cannot constitute both advertising and labeling. The assumption is unwarranted. Most, if not all, labeling is advertising. The term "labeling" is defined in the Act as including all printed matter accompanying any article. Congress did not, and we cannot, exclude from the definition printed matter which constitutes advertising.

5. The rule of strict construction invoked by appellee has little or no application to statutes designed, as the Federal Food, Drug and Cosmetic Act is designed, to prevent injury to the public health. A. O. Andersen & Co. v. United States, 9 Cir. 284 F. 542, 543; United States v. 48 Dozen Packages of Gauze, 2 Cir., 94 F. (2d) 641, 642.

6. It is immaterial, if true, that the makers and advertisers of Nue-Ovo could have been proceeded against by the Federal Trade Commission under the Federal Trade Commission Act and could have been ordered to cease and desist from publishing and distributing the circular entitled "What is Arthritis." The power of the District Court to condemn misbranded articles is not impaired, dimin-

ished, or in any wise affected by the possibility that such misbranding may also be the subject of a cease and desist order or even by the fact, if it be a fact, that such an order has actually issued.

7. There is no merit in appellee's contention that the libel does not sufficiently charge that the circular entitled "What is Arthritis" is false and misleading. The circular states, in substance and effect, that Nue-Ovo is a competent and beneficial treatment for arthritis. The libel charges that it is not, and that, therefore, the circular is false and misleading. No other charge is necessary.

SPECIFICATIONS OF ERRORS

1. TheAppellate Court erred in holding that under the facts as stated, the circulars accompanied the packages and constituted their labeling within the meaning of Sec. 201 (m) of the Act, 21 U.S.C.A. No. 321 (m).

2. The Appellate Court erred in holding that it was immaterial whether the packages and the circulars did or did not travel in the same crate, carton or other container or on the same train, truck or other vehicle during their interstate journey.

3. The Appellate Court erred in holding that Circulars not contained in or on the package containing the goods constituted labeling within the meaning of the Act.

ARGUMENT

This case is one of first impression. The provisions of section 201 (m) of the Federal Food, Drug, and Cosmetic Act here involved (21 U.S.C., sec. 321 (m)) have not heretfore been construed by any Appellate Court.

It is believed that the decision of the appellate court holding that the circulars accompanied the packages and constituted their labeling within the meaning of the act is based on a premise demonstrably false.

It is believed further that the effect of a proceeding before the Federal Trade Commission which has become final, based on the same circulars involved in an action instituted under the authority of the Food and Drug Act, has been decided without due consideration of the doctrine of *res judicata.*

The Food and Drug Act and the Federal Trade Commission Act touch the interest of the business of the country to an extent which admits of no exaggeration. The importance of sound judicial construction of the provisions of those acts needs only be stated to be proved.

Because of these facts, the case is worthy of further attention, to the end that matters bearing on the intent of Congress in the enactment of the statute in question may be considered and given their proper place in the judgment which this court shall finally

pronounce, and to the further end that a conflict of jurisdiction as between the Food and Drug Administration and the Federal Trade Commission, which Congress was careful to avoid, be not created by judicial construction.

The Proper Construction of the Section of the Food and Drug Act Here Involved.

A proper construction of the phrase "accompanying such article" as contained in the definition of the word "labeling" requires that the phrase be held to mean that circulars, booklets or pamphlets accompany the article in question only when they are contained *on* or *in* the article or package; that, if they are merely in proximity, close or remote, to the article, they do not accompany the article *in the statutory sense of the phrase.* They are then advertising within the statutory definition of that word as contained in the Federal Trade Commission Act.[2]

We do not wish to be understood as being of the opinion that a given circular, booklet or pamphlet cannot be both labeling and advertising at one and the same time in the sense in which those words are commonly and generally understood. Our position is that booklets, circulars and pamphlets, while a species of advertising in the commonly accepted under-

2 Section 15 (U.S.C.A. sec. 55): "For the purposes of sections 12, 13 and 14—a. The term 'false advertisement' means an advertisement *other than labeling,* which is misleading in a material respect * * *."

standing of the word, acquire the *statutory* status of *labeling* only if they are *on* or *in* the article or its package. If separate and apart from the article and its package, such media of advertising are beyond the scope of the Food and Drug Act, do not "accompany" the article *in the statutory sense of the term*, remain only advertising as such, are therefore within the provisions of the Federal Trade Act, and cannot by virtue of the statutory definition itself be labeling. Whatever significance may be commonly accorded these words, under the definition of advertising contained in the Trade Act, that which is labeling cannot be advertising, and, conversely, if the media is such as to properly constitute advertising under the Trade Act, *the idea of labeling is statutorily excluded.*

The history of the two acts, judicial construction, construction by the Federal Trade Commission, and the source of the very phrase "accompanying such article" demonstrate the fact:

The History of the Acts

The Food and Drug Act as first enacted, insofar as it pertained to labels, was held to apply only to matter physically *on* the article and not applicable to advertising media contained *within* the package. (*U. S. v. American Druggists Syndicate*, 186 Fed. 387.)

The cited case was decided in 1911. To meet the defect in the act pointed out in that decision, the act was amended in 1912 and extended to include matter contained *in the article or its package.* (*Seven Cases v. U. S.*, 239 U.S. 510, 60 Lawyers' Ed. 411.)

All during this time advertising was within the scope of the Federal Trade Act, and false and misleading advertisements were controlled under or by virtue of that act, this not because of express control conferred in the act, but because advertising was judicially considered to be an unfair method of competition, well within the organic law of the Federal Trade Commission (*Federal Trade Commission v. Winstead Hosiery Co.*, 258 U.S. 483, and *Royal Baking Powder Co. v. Federal Trade Commission*, 281 Fed. (C.C.A. 2nd) 744.)

Efforts were made in Congress to so amend the Food and Drug Act as to bring within it control over false advertising.[3]

All of the acts which were introduced with this object in view failed passage because of the attempt to transfer control of false advertising from the Trade Commission to the Food and Drug Administration.[4]

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3 S. 1944, 73rd Congress, 1st and 2nd Sessions.
S. 2000, 73rd Congress, 2nd Session.
S. 2800, 73rd Congress, 2nd Session.
S. 5, 74th Congress, 4th Session.
S. 5, 75th Congress, 1st and 2nd Sessions.

4 74th Congress, 2nd Session, Cong. Rec., pp. 10, 514.

Each bill introduced for the purpose of conferring on the Food and Drug Administration jurisdiction over advertising defines the term "label" as meaning the principal labels (1) *upon* the immediate container and (2) *upon* the outside container of the article. They define the term "labeling" as including all labels and other written, printed and graphic matter *in any form whatsoever* accompanying the article.[5] They further define the term "advertisement" as including all representations of fact or opinion, disseminated in any manner or by any means *other than by the labeling.*

As finally enacted, the definition accorded to the term "label" was amended to include only matter *upon* the immediate container. The definition of "labeling" was changed to embrace only matter *upon* the article or any of its containers or wrappers or *accompanying such article.* As finally enacted, the all-embracive definition of labeling contained in the various bills refused passage, which would have included written, printed and graphic matter *in any form whatsoever* accompanying the article, *was omitted,* as were all provisions which defined the term "advertisement".

At the same session of Congress at which the Food and Drug Act as it now reads was finally passed, amendments to the Federal Trade Commission Act were adopted for the express purpose of giving more effective and necessary control over

[5] See Brief of Appellant, pages 12-13.

false advertisements of food, drugs, devices and cosmetics to the Federal Trade Commission.[6]

It will be observed that the phrase "accompanying the article", as it appears in the present law, appeared in substance in each of the bills which had for their object the enlargement of the jurisdiction of the Food and Drug Act so as to embrace false advertising. The words in these various bills were "accompanying any food, drug, or cosmetic". We are not without light as to the meaning in which this was understood by Congress. Senator Copeland, who fathered the various bills through the several sessions of Congress in which the amendments were considered, speaking to section 6 (a) of the first bill introduced by him for the purpose (S. 1494, 73rd Congress, 1st Session), the section which dealt with labeling, in comparing the bill with the then existing law, stated that the bill as presented covered cosmetics, as to which there was no provision in the old law, but that otherwise the proposed law was essentially the same as the old.[7]

At the second session of the same Congress, Senator Stephens read the report[8] of Senator Copeland's Committee on Interstate and Foreign Commerce concerning the same bill, and in connection with the significance to be accorded to the definition of labeling had this to say:

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6 House Report No. 163, 1st Session, 75th Congress. House Report No. 1613, 1st Session, 75th Congress.

7 73rd Congress, 1st Session, Cong. Rec. p. 5721.

8 S. Rep. 493, 2nd Session, 73rd Congress.

"Paragraph (h) defines label as the principal label on the immediate container and on the outside of the retail package, and paragraph (i) defines labeling as including labels and all other written, printed or graphic matter accompanying the article. *This differentiation* between label and labeling *is necessary because* the declaration of certain facts for the information and guidance of consumers required *on* the label by the substantive provisions of this bill should, to accomplish their purpose, appear on the principal label or labels where they can be easily observed, rather than in side panels of the labeling *or in circulars WITHIN the package where they may appear* * * *"

Further speaking to section 6 of the proposed bill, the Senator said:

"Section 6 is a general misbranding paragraph applicable to all products covered by the bill. Paragraph (a) holds these products misbranded if their labeling is false or misleading in any particular. This language is in the misbranding provisions of the present law, and has been fully interpreted by the United States Supreme Court."

When Senate 5 was before the first session of the 75th Congress in 1937, the committee report on the bill clearly disclosed the distinction that was drawn between advertising and labeling. The report[9] in this connection reads as follows:

"There has been controversy as to whether the Food and Drug Administration or the Federal Trade Commission should enforce the bill's provisions on advertising. *On the premise* that

[9] Report No. 152, Senate Committee in Congress, 1st Session, 75th Congress, February 15, 1937.

> ***advertisements*** of foods, drugs, and cosmetics *are nothing more than extensions of the labeling,* this bill proposes that the control be vested in the Food and Drug Administration which enforces the provisions on adulteration and labeling. But, it does not have the effect of depriving the Federal Trade Commission of its jurisdiction to proceed against false advertising in such form as to make it an unfair method of competition. The bill specifically provides that it shall not be construed as impairing or diminishing the powers of the Federal Trade Commission."

It is, we believe, clear beyond doubt that when these various bills were before Congress the phrase "accompanying the article", as contained in the definition of labeling, was intended by the author of the bills and was understood by Congress to mean only such matter, circulars, booklets, pamphlets or similar media as was contained *within* the package; that matter not within the package was understood to be beyond the scope of the definition accorded to the word "labeling"; was embraced within the definition of advertising under the Federal Trade Commission Act; and jurisdiction over such matter specifically refused to the Food and Drug Administration and specifically continued with the Federal Trade Commission.

For emphasis we repeat that the statutory definition of the word "labeling" shows no serious de-

parture, if any, from its well established meaning. Sec. 321 (m), Title 21, U.S.C. defines it:

> "The term 'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."

Subsection (1) adheres rigidly to the orthodox concept by which the labeling is affixed to the article itself or to the paper or substance which is its dress.

Subsection (2) was no doubt enacted to cover the common practice of manufacturers' inserting small circulars containing directions for usage, etc. in the carton which, strictly speaking, are not attached to the article but which nonetheless accompany, the article into the homes of the consumers.

The essential factor, *that labeling always goes with the product*, is preserved by the statutory definition. This factor, it is submitted, distinguishes "labeling" from "advertising". In defining "labeling" the Congress was plainly dealing with printed matter that appears on each bottle or container or is wrapped or packed with each bottle or container and hence is delivered to the consumer with each and every purchase.

In view of the fact that Congress decided that evils in the field of advertising as to food, drugs, and cosmetics were to be handled by the Federal Trade Commission, and the Copeland Bill was there-

fore amended accordingly, there is no justification for any court to put a strained and unnatural construction upon the term "labeling". Furthermore, the Food and Drug Act is a criminal statute. In *United States v. Weitzel*, 246 U.S. 533, the Supreme Court stated (p. 543):

> ". . . . Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive. . . ."

To the same effect, see *Walter W. Oeflein, Inc. v. The State*, 177 Wis. 394, 395.

Judicial Construction and Source of the Phrase

The old law, prior to the 1938 amendments, provided, as we have seen, that labeling included only such matter as was *on* or *in* the article or its package. The law, as it presently reads, changes the phraseology of the definition, *but does not change its sense.*

The Food and Drug Administration understood the old law to mean that control was afforded under it over statements concerning a product that *accompanied* the package in the form of circulars.[10]

All who had to do with these various bills had a common understanding of the definition of labeling

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10 Testimony of Walter G. Campbell, Chief of the Food and Drug Administration, before a subcommittee of the Senate Committee on Commerce. Dec. 7-8, 1933. 73rd Congress, 2nd Session. (R. 16.)

as contained in the old law and the proposed amendments. We have seen that this understanding was that the definition of "labeling" under the old law, as including matter on or in the package, *was synonymous* with "accompanying the package".

The source of their understanding of these definitions as synonymous is readily available. The Supreme Court of the United States had recently decided the case of *Seven Cases v. U. S.*, supra. The Attorney General, in presenting the case for the United States, first used the terms synonymously.[11] Justice Hughes, in writing the opinion for the court, followed the arguments of the Attorney General and in his opinion *used the very words* which now appear in the statute and which are the subject of the discussion here. He there says:[12]

> "It appears from the legislative history of the act that the word 'contained' was inserted in the amendments to hit precisely the case of circulars or printed matter placed *inside* the package, and we think that is the only import of the provision * * * and the power of Congress manifestly does not depend upon the mere location of the statement *accompanying the article*, that is, upon the question *whether the statement is on or in the package* which is transported in interstate commerce."

Repeatedly throughout this opinion Justice Hughes used these terms as interchangeable. For instance, in considering the phrase "false and fraudulent", he says:

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11 See case as reported in 60 Lawyers' Ed., p. 413.
12 60 Lawyers' Ed. 416.

> "This phrase must be taken with its accepted legal meaning, and thus it must be found that
>
> the statement *contained in the package* was put there to *accompany the goods*, with the actual intent to deceive * * *."

This case was considered by the House Committee, which considered and reported the bill which in 1938 became the law as it appears in the books today.[13]

Here, we believe, is the source of the phrase "accompanying such article" as it appears in the section of the law on the interpretation of which this case hinges, and here also is the meaning which that phrase must be accorded. As used by Justice Hughes and as understood by Congress, the phrase means that written, printed or graphic matter cannot be said to *accompany* an article within the sense of the statute unless such matter is *on* or *in* the article or its package. While it is undoubtedly true, *generally speaking*, that circulars, booklets or pamphlets accompany an article when shipped together, although in separate packages, it would be legislation by judicial construction to hold that such matter accompanies an article, *within the statutory significance* accorded to this term in the Food and Drug Act, unless the matter itself is a part of the package, that is, where the matter is on or in the article or its container. Furthermore, it is not true, *generally speak-*

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[13] Rep. No. 2139, House Committee on Interstate and Foreign Commerce, 3rd Session, 75th Congress, Apr. 14, 1938.

ing, that circulars could be said to accompany an *article* when the two are shipped in separate containers traveling in different trains, trucks, or other vehicles.

Construction by Federal Trade Commission

As we have seen, the jurisdiction of the Federal Trade Commission over advertising expressly excludes such matter as comes within the statutory connotation of labeling. This court has quite recently upheld a cease and desist order entered by the Federal Trade Commission on a showing that booklets and pamphlets, together with other media, contained false and misleading statements. (*Alberty v. Federal Trade Commission,* 118 Fed. (2d) 669.)

Summary

In view of the foregoing, we believe that, unless it appears that circulars, booklets and pamphlets are *in* the package or its containers, they cannot be said to accompany the article so as to constitute labeling within the meaning of the act.

The Effect That Should Be Given to a Final Order of the Federal Trade Commission Based on the Same Facts.

The court has here decided that it is immaterial that a cease and desist order might be or has been issued by the Federal Trade Commission.

It is felt that the court has failed to give proper effect to the doctrine of *res judicata* in this conection. If it be the fact that a cease and desist order was granted or was denied based on the same advertising matter that is made the basis of the libel, the issue as to whether the circulars were false and misleading, also as to whether they were advertising or labeling necessarily would be foreclosed in this proceeding based on the Food and Drug Act, by virtue of the doctrine of *res judicata.* This is so for the reason that a finding by the Trade Commission that the circulars constitute advertising necessarily negatived the possibility that they were labeling. False advertising, as defined in the Federal Trade Act, means an advertisement other than labeling.[14]

Under familiar rules (*Cromwell v. County of Sac,* 94 U.S. 351, 352) the finding by the Federal Trade Commission on this issue when it has become final operates as an estoppel against the right of the Government to assert the contrary in a proceeding under the Food and Drug Act.

We do not desire to be understood as contending that a cease and desist order directed against the circulars in question would, under any and every circumstance, have this effect. If the circulars proceeded against before the Trade Commission were entirely separate and apart from the articles to

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14 Sec. 15, Fed. Trade Com., 15 U.S.C.A., Sec. 55.

which they related, a finding that they were advertising would of course be sound. Where, however, the finding was based on facts which showed that the order was issued against the circulars because of their proximity to the article in question, where they accompanied the article, in the *commonly* accepted understanding of that term, the negation of labeling necessarily implied in the finding of advertising would preclude a later finding of labeling on the same facts.

CONCLUSION

In conclusion we respectfully suggest that for the reasons herein stated the decision of the Appellate Court is unsound; that it should be held that a circular recommending a product is purely advertising, unless it is inserted with the article in a common cover. Certain it is, that there is no showing that a circular of advertising matter accompanies the advertised article in interstate commerce, unless it be shown that it crosses a state border in the same train, truck or other vehicle with the advertised article.

We also respectfully suggest that the importance of the issues of law here involved as they affect many persons engaged in the business of manufacturing drugs, food products and cosmetics is such as to justify and require a decision and determination of

this question by the Supreme Court of the United States.

Respectfully submitted,
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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 266

RESEARCH LABORATORIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 60–66) is reported at 126 F. (2d) 42.

JURISDICTION

The judgment of the circuit court of appeals was entered February 24, 1942 (R. 66–67). A petition for rehearing was denied April 2, 1942 (R. 67). On June 26, 1942, the time for filing a petition for a writ of certiorari was extended to August 1, 1942, by order of Mr. Justice Douglas. The petition for a writ of certiorari was filed July 30, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether misleading circulars "accompany" a drug within the meaning of the Federal Food, Drug and Cosmetic Act, which defines "labeling" as including "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article," when they are shipped in interstate commerce from the same point of origin, arrive simultaneously at the same destination, and are displayed with the drug in retail stores.

STATUTE INVOLVED

The pertinent provisions of the Federal Food, Drug and Cosmetic Act (Act of June 25, 1938, ch. 675, 52 Stat. 1840); are:

Section 304 (21 U. S. C. 334 (a)):

> (2) Any article of * * * drug * * * that is * * * misbranded when introduced into or while in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found:
> * * *

Section 502 (21 U. S. C. 352):

> A drug or device shall be deemed to be misbranded—
> (a) If its labeling is false or misleading in any particular.

Section 201 (21 U. S. C. 321):

> For the purposes of this chapter—
>
> * * * * *
>
> (m) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

STATEMENT

Pursuant to Section 304 of the Federal Food, Drug, and Cosmetic Act, *supra,* a libel was filed in the District Court for the Western District of Missouri for the condemnation of 143 packages of a drug called "Nue-Ovo" (R. 12–16). Petitioner, the manufacturer of the article, was permitted to intervene in the proceeding (R. 6–12) and obtained removal of the cause to the District Court for the Western District of Washington (R. 1–6). Exceptions to the libel were filed by petitioner and allowed by the district court (R. 17–19), whereupon the Government filed an amended libel (R. 19–23). Exceptions to the amended libel were then filed (R. 23–24) and on June 2, 1941, the court dismissed the action on the ground that the amended libel failed to allege facts sufficient to state a cause of action (R. 25–26). A motion by the Government for leave to file a second amended libel (R. 29–35) was denied (R. 45–46). On appeal, the circuit court of appeals reversed the judgment dismissing the amended libel (R. 60–67).

The amended libel (R. 19–23) alleged that 143 packages each containing 3 bottles of Nue-Ovo were shipped in interstate commerce from Chicago to the Crown Drug Company at Kansas City, Missouri. A shipment of circulars entitled "What is Arthritis" was also shipped from Chicago and was received by the Crown Drug Company "simultaneously with the said article." (R. 21). These circulars (R. 15–16) "create the impression in the mind of the reader thereof that the said article is a competent treatment for Arthritis * * * whereas the said article is not" (R. 20). The circulars were then distributed along with the drug to three of the Crown Company's retail drug stores "and were prominently displayed in the said retail drug stores in the same rooms and in close proximity to said packages of 'Nue-Ovo'" and were distributed to "members of the public who appeared in said drug stores" (R. 22).[1]

ARGUMENT

A "misbranded" drug subject to condemnation may be one which has a false or misleading "labeling," which is defined by the Federal Food,

[1] It appears from the second amended libel (R. 29–35), which the court denied leave to file (R. 45–46), that the labels on the bottle and its package contained the name "Nue-Ovo" and dosage directions, but omitted altogether any statement as to the ailments or diseases it was designed to cure. Hence without the circulars, the medicine was nothing except liquid in bottles for a purpose unknown.

Drug and Cosmetic Act, *supra,* as "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." Petitioner contends that under this definition a circular is not "accompanying" an article unless it is contained within the article's package (Br. 10–21). We think it is plain, however, both from the legislative history of the Act and from the plain meaning of the words "accompanying such article" that Congress did not intend that the definition should be so narrowly construed.

The Food and Drug Act of 1906, as amended, provided that a drug was to be deemed misbranded "If its package or label shall *bear or contain* any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent" (italics supplied) (Act of August 23, 1912, 37 Stat. 416). The word "contain" was inserted by amendment in 1912 to cover circulars or printed matter placed inside the package (*Seven Cases* v. *United States,* 239 U. S. 510, 515).[2]

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[2] The Food and Drug Act of 1906 originally applied the term "misbranded" to "the package or label of [a drug or article of food] which shall *bear* any statement, design, or device regarding such article * * * which shall be false or misleading in any particular * * *" (italics supplied) (34 Stat. 768, 770) and this language was held inap-

In 1933, a new food and drug bill (S. 1944, 73d Cong., 1st Sess.), also covering cosmetics, was introduced in the Senate by Senator Copeland (77 Cong. Rec. 5721) and was replaced (78 Cong. Rec. 59) by another bill (S. 2000, 73d Cong., 2d Sess.), which in turn was superseded by a third bill (S. 5, 74th Cong., 1st Sess.; 79 Cong. Rec. 100). Consideration of these bills extended over a period of five years, the purpose of Congress being to cover loopholes and inadequacies in the existing law and to amplify and strengthen provisions designed to safeguard the public health and prevent deception.[3] In all of the bills and their numerous revisions, the existing definition of a "misbranded" drug as one whose package or label shall *bear or contain* any false or fraudulent statement, was supplanted, *inter alia,* by the provision that a drug or device shall be deemed to be misbranded "If its labeling is false or misleading in any particular" and that "The term 'labeling' includes all labels and other written, printed, and graphic matter, in any form whatsoever, *accompanying* any food, drug, or cosmetic" (italics supplied) (see 79 Cong. Rec. 4849, 4859,

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plicable to false or misleading circulars enclosed in the package with the article (*United States* v. *American Druggists' Syndicate*, 186 Fed. 387, 391 (E. D. N. Y.)).

[3] See S. Rep. No. 646, 74th Cong., 1st Sess., p. 1; H. Rep. No. 2755, 74th Cong., 2d Sess., pp. 1–3; S. Rep. No. 152, 75th Cong., 1st Sess., p. 1; S. Rep. No. 91, 75th Cong., 1st Sess., p. 1; H. Rep. No. 2139, 75th Cong., 3d Sess., pp. 1–2; 79 Cong. Rec. 4262.

8351; 80 Cong. Rec. 10230, 10514). At no time during the debates in Congress or in the House and Senate reports on the bills was any specific discussion had as to the reason for the new definition. It is true that there is an inference in one of the committee reports to the effect that the word "labeling" was designed to include circulars contained in the package or article.[4] There is nothing to indicate, however, that it was intended that the definitions given were intended to include only such circulars. On the contrary, Senator Copeland assumed a broad interpretation of the word "accompanying," stating that "No one questions * * * that the Food and Drug Administration * * * shall pass upon the material which goes with the package" (79 Cong. Rec. 5023). Similarly, the Chief of the Food and Drug Administration interpreted the proposed definition of the term "labeling," supra, "to include not only the label *but all circulars and plac-*

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[4] Thus in S. Rep. No. 646, 74th Cong., 1st Sess., upon which petitioner relies (Br. 15), it is stated (p. 2):

"The differentiation between label and labeling is necessary because the declarations of certain facts for the information and guidance of consumers required by the bill should, to accomplish their purpose, appear on the principal label or labels where they can be easily observed, rather than on side panels of the labeling or in circulars within the package where they may escape notice."

The language quoted by petitioner in the second paragraph of his brief on page 15 obviously refers to interpretation of the words "false or misleading in any particular," rather than to the term "labeling."

ards for display purposes and the like that may in any form whatsoever accompany the article." (Italics supplied.) Hearings on S. 1944 before subcommittee of the Senate Committee on Commerce, Dec. 7 and 8, 1933, 73d Cong., 2d Sess.

The proposed definition was revised to its present form in conference by omitting only the words "in any form whatsoever" (see 83 Cong. Rec. 7788, 9087–9088; H. Rep. No. 2716, 75th Cong., 3d Sess.) with no further explanation than that there were many minor changes in the bill and that "all of them were the result of careful attention given by the House Committee for the purpose of improving, balancing, and strengthening the bill" (83 Cong. Rec. 9095).

The bills also sought to give jurisdiction over false advertisements to the Food and Drug Administration on the premise that advertising was "an extension of labeling" (Pet. 15–16; 79 Cong. Rec. 5022–5023; S. Rep. No. 152, 75th Cong., 1st Sess., p. 3). The term "advertisement" was defined as including "all representations of fact or opinion disseminated in any manner or by any means *other than by the labeling,* for the purpose of inducing, directly or indirectly, the purchase of food, drugs, devices, or cosmetics" (italics supplied) (see 79 Cong. Rec. 5021; 80 Cong. Rec. 10230, 10514; 81 Cong. Rec. 2003). Much controversy arose on the question whether the Food and Drug Administration or the Federal Trade Commission

should have jurisdiction over advertising, and it is clear from the debates in this connection that members of Congress were concerned only about newspaper, magazine and radio advertising (see 79 Cong. Rec. 4916, 4918, 5021, 5024–5025, 5140, 5216–5217; 80 Cong. Rec. 10241, 10243, 10675, 10677–10679; 81 Cong. Rec. 2005–2006; 83 Cong. Rec. 7899–7900).[8]

It therefore does not appear that Congress had any intention to restrict the word "accompanying" to false or misleading matter contained in the article's package or to give the Federal Trade Commission jurisdiction over false or misleading matter that goes with an article, as petitioner contends. Congress was enacting a law designed to cover the loopholes and inadequacies of the Food and Drug Act of 1906, as amended, and in doing so rejected the specific words "bears or contains," which appeared in the old Act and which compel

[8] Ultimately, the advertising provisions were taken out of the food and drug bill (cf. 83 Cong. Rec. 7788–7790, 7795–7797) and were placed in the Act of March 21, 1938, amending the Act creating the Federal Trade Commission (S. 1077, 75th Cong., 1st Sess., 52 Stat. 111, 114–117; 15 U. S. C. 52–56, inc.). This Act defines the term "false advertisement" as "an advertisement, *other than labeling*, which is misleading in a material respect; * * *" (italics supplied) (15 U. S. C. 55 (a)) which plainly does not interfere with the jurisdiction of the Food and Drug Administration over false advertising which "accompanies" the article. Petitioner impliedly concedes this to be true (Pet. 16) for he argues that the circulars in question are advertising only because they did not "accompany" the article, i. e., were not contained "within the package."

the interpretation for which petitioner contends, and replaced them by the broader language of "(1) upon any article or any of its containers or wrappers, or (2) accompanying such article." Certainly, Congress could not have intended that the Act might be circumvented by the simple expedient of using "accompanying" circulars to convey false or misleading information to the purchasing public, instead of placing that information on the article or in its package. Cf. *Austin* v. *Tennessee,* 179 U. S. 343, 361.

Full effect should therefore be given to the phrase "accompanying such article," which plainly means more than "contained in" the package of the article. As this Court has stated, no single argument has more weight in statutory interpretation than the plain meaning of the words of the statute. *Browder* v. *United States,* 312 U. S. 335, 338; see also, *United States* v. *American Trucking Associations, Inc.,* 310 U. S. 534, 543. The "courts are not free to reject that meaning" where no absurd result or obvious thwarting of the statute follows "and where, as here, it appears to be consonant with the purposes of the Act as declared by Congress and plainly disclosed by its structure." *Helvering* v. *Hammel,* 311 U. S. 504, 510–511; cf. *United States* v. *Rosenblum Truck Lines,* 315 U. S. 50, 55.

Finally, that the circulars entitled "What is Arthritis" accompanied the 143 packages of Nue-

Ovo in interstate commerce, as required by the Act, seems clear. The circulars were shipped in interstate commerce and received with the articles at the warehouse of the Crown Drug Company, placed in the same room with the packages for distribution to the three retail stores of the Crown Drug Company, and prominently displayed in those stores in proximity to the packages.[6] Since the circulars and packages were in interstate commerce until they were placed together in the same room for distribution, if not longer,[7] the circulars accompanied the packages in interstate commerce, as the court below held (R. 64–65), and constituted a misbranding which rendered the 143 packages of Nue-Ovo subject to seizure under the provisions of 21 U. S. C. 334 (a) (*supra*, p. 2).[8]

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[6] Petitioner admits that *generally speaking*, "circulars, booklets or pamphlets accompany an article when shipped together, although in separate packages," but claims that they do not accompany an *article* when the two are shipped in separate containers traveling in different trains, trucks, or other vehicles (Br. 20–21). This is obviously a distinction without any substantial difference.

[7] See *Pacific States Co.* v. *White*, 296 U. S. 176, 184; *Schechter Corp.* v. *United States*, 295 U. S. 495, 543; *Weeks* v. *United States*, 245 U. S. 618, 622; *McDermott* v. *Wisconsin*, 228 U. S. 115, 135; *Leisy* v. *Hardin*, 135 U. S. 100.

[8] Petitioner also asserts that a Federal Trade Commission proceeding, the nature of which is not disclosed in petitioner's brief or in the record, is *res judicata* with respect to the question of whether the circulars entitled "What is Arthritis" are a "labeling" or an "advertisement" (Br. 21–23). We are advised by the Federal Trade Commission that no formal complaint has ever been issued by the Commission involving

CONCLUSION

The case was correctly decided below and presents no conflict of decisions or other question warranting review by this Court. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
OSCAR A. PROVOST,
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Attorneys.

AUGUST 1942.

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the product "Nue-Ovo" and that petitioner apparently has reference to a matter which is not of public record—an investigation conducted on an application for the issuance of a complaint. There was, therefore, no "proceeding" against petitioner and the doctrine of *res judicata* is, for that reason alone, inapplicable.

U. S. GOVERNMENT PRINTING OFFICE: 1942

No. 266

Office - Supreme Court, U. S.
FILED
SEP 28 1942
CHARLES ELMORE CROPLEY

IN THE SUPREME COURT of the United States

OCTOBER TERM, 1942

RESEARCH LABORATORIES, INC., *Petitioner*,

vs.

UNITED STATES OF AMERICA.

PETITIONER'S REPLY BRIEF

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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No. 266

IN THE SUPREME COURT of the United States

OCTOBER TERM, 1942

RESEARCH LABORATORIES, INC., *Petitioner,*

vs.

UNITED STATES OF AMERICA.

PETITIONER'S REPLY BRIEF

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

ON THE QUESTION PRESENTED

The Government has served and filed a Brief resisting the Petitioner's application for Writ of Certiorari. The Brief for the Government states that the question presented is as follows:

> "Whether misleading circulars 'accompany' a drug within the meaning of the Federal Food, Drug and Cosmetic Act, which defines 'labeling'

as including 'all labels and other written, printed, or graphic matter (1) upon any article or any of its containers, or wrappers, or (2) accompanying such article,' when they are shipped in interstate commerce from the same point of origin, arrive simultaneously at the same destination, and are displayed with the drug in retail stores."

On behalf of the Petitioner we respectfully submit that this recital is not a complete statement of the true question presented. We feel that the proposition before the Court should read somewhat as follows:

"Whether misleading circulars 'accompany' a drug within the meaning of the Federal Food, Drug and Cosmetic Act, which defines 'labeling' as including 'all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article,' when they are shipped *by a consignor* in interstate commerce from the same point of origin, arrive simultoneusly at the same destination, and are displayed *by the consignee* with the drug in retail stores, *even though traveling in a separate train, truck or other vehicle throughout the interstate journey.*"

ARGUMENT

We feel that the court should have in mind the fact that while both the article and the advertising matter were shipped by one person, the two commodities traveled in different trains, trucks or other vehicles, and that another person, the consignee, was the one who placed them in close proximity, and

that this was done by this other person after receipt thereof, and after the interstate journey had been completed. The act of shipment was the act of the consignor, who shipped the two items (the drug and the circulars) separately; the act of placing the circulars in close proximity with the drug was the act of the consignee.

The circulars in question were "labeling" or they were "an advertisement". Under the statutes involved in this matter they could not constitute both "labeling" and a "false advertisement". I believe the Government and the Petitioner are in agreement on that proposition, although such doctrine is directly in conflict with the decision of the Circuit Court of Appeals which says that such "assumption is unwarranted". In making that statement it is quite clear that the Appellate Court lost sight of the plain wording of the statute to the effect that "the term 'false advertising' means an advertisement *other than labeling* which is misleading in a material respect".

It should be kept in mind that we are not now dealing with the usual respective meanings of the expressions "labeling" and "false advertisement", but are dealing with the statutory meanings thereof. Generally speaking, the "labeling" or "branding" of a drug is that which is attached to the container; however, the word as now employed by the Federal Food, Drug and Cosmetic Act includes not

only the label or labels, but also includes all "other written, printed or graphic matter (1) upon any article or any of its containers or wrappers or (2) accompanying such article". This definition of labeling is a purely statutory definition; and it is the office of the Court to make the distinction between "labeling" that constitutes misbranding in interstate commerce, and a "false advertisement" as that term is employed in the Federal Trade Act.

Clearly, it was the purpose of Congress to define and keep separate the respective jurisdictions of the Federal Trade Commission and the Food and Drug Administration. The former has jurisdiction over "false advertisements"; and the latter has jurisdiction over "misbranding", or labeling that is false and misleading.

It must be assumed for the purposes of this case that the circulars which were shipped in interstate commerce were false and misleading, but the Government and the Petitioner differ on whether or not those circulars constituted "labeling" of an article that did not travel with them at any time in interstate commerce or whether under such circumstances, they constituted a "false advertisement" within the meaning of the Federal Trade Act. We fully concur with the argument advanced by the Government that "no single argument has more weight in statutory interpretation than the plain meaning of the words of the statute"; and that "the

courts are not free to reject that meaning where no absurd result or thwarting of the statute follows and where, as here, it appears to be consonant with the purposes of the Act as plainly disclosed by its structure". However, we cannot agree with the assertion that the phrase "accompanying such article" plainly means (or means at all, for that matter) traveling in a separate train, truck or other vehicle. On the other hand, we do not think the phrase "accompanying such article" has any application to advertising matter unless that advertising matter does "accompany such article" in the generally accepted meaning of that phrase. To "accompany an article" in the generally accepted sense of that phrase the circulars must be with the article as the article travels in interstate commerce, at least to such extent that a complete loss of the carrying vehicle would result in a loss of both items; and to construe it otherwise is to give to the expression a strained and unnatural meaning.

Nor is it necessary for the protection of society that the words should be given this bizarre construction asked by the Government. If the circulars in question are not "labeling", then they are "advertising". True, if they are not "labeling" the Food and Drug Administration has no jurisdiction thereover, but they then become advertising; and if they constitute a "false advertisement" the Federal Trade Commission has jurisdiction over the matter on the ground that it constitutes unfair competition,

and the Petitioner's misconduct can be adequately dealt with by that tribunal.

As hereinbefore pointed out, it is a matter of mathematical demonstration that the circulars in this case cannot be a "false advertisement", under the jurisdiction of the Federal Trade Commission and at the same time be "labeling" under the jurisdiction of the Food and Drug Act. Which, then, are the circulars here involved? If the Petitioner were being proceeded against by the Federal Trade Commission upon the ground that the circulars in question were false and misleading and therefore constituted unfair competition, could any person present any reasonable argument against the jurisdiction of that tribunal? We believe not. Manifestly, these circulars are advertising matter. If they are false and misleading, it is perfectly clear that they constitute unfair competition within the meaning of the Federal Trade Act, as that Act has been construed by the Courts. We feel that it must be freely confessed that circulars containing false advertising relative to a drug, which are sent separate from the article itself, traveling in another train, truck or vehicle must be regarded as a "false advertisement", rather than "labeling". To hold otherwise would be to do violence to the plain meaning of the words employed.

Finally, if the circulars in this particular case, traveling separately from the drug, as they presum-

ably did, can be held to constitute "labeling" and therefore subject to the jurisdiction of the Food and Drug Administration, and not subject to the jurisdiction of the Federal Trade Commission (for, as pointed out above, they cannot be both "labeling" and a "false advertisement" at one and the same time) all other circulars, advertising any food, drug or cosmetic must also be construed to constitute labeling, and the jurisdiction of the Federal Trade Commission is thereby narrowed to a point that Congress and the Commission itself never dreamed of.

CONCLUSION

The Brief submitted on behalf of the Government seems eminently fair, but far from convincing. While counsel for the Government assert that the case was correctly decided in the Circuit Court of Appeals, it seems quite apparent to the writer that they do not subscribe to the doctrine announced in the opinion written by the Circuit Court of Appeals (R. 65) that the circulars might constitute both "false advertising" and "labeling", taking those words in their statutory significance. As heretofore pointed out, the fact that this doctrine is untenable can be demonstrated, and has been demonstrated to a mathematical certainty. It has been made impossible by the statutory definition of the words "false advertisement". As stated, and repeated, in the

statute, a "false advertisement" is a representation of fact or opinion *other than labeling.* If to hold that the Federal Food, Drug and Cosmetic Act did not have jurisdiction in the instant case would subject the public to danger because the Petitioner would therefore go "unwhipped of justice" for a wrongful act, the decision of the Circuit Court of Appeals might be approved, or at least favored. But, since the Federal Trade Commission has jurisdiction adequately to correct the alleged misconduct of the Petitioner (and has, so it seems, had under consideration the issuance of a complaint based on this same circular) this suggested necessity for this decision does not exist.

In closing we respectfully submit that to place upon the words "accompanying the article" the strained and unnatural construction requested by the Government in this case would violate the well recognized rule that a criminal statute such as we have here, providing for heavy fines and for imprisonment up to three years, should be rather strictly construed.

Respectfully submitted,

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